

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

ANDREA WOOD, *et al.*,

Plaintiffs,

v.

SGT INVESTMENT, *et al.*,

Defendants.

Case No. 3:22-cv-00513-MMD-CSD

ORDER

**I. SUMMARY**

*Pro se* Plaintiffs Andrea Wood and Taylor Packwood sued Defendants SGT Investment, Clement Holdings, Tom Malgesini, and Tom Malgesini IRA regarding an alleged wrongful foreclosure of Wood's property. (ECF No. 5 ("Complaint").) Before the Court are SGT and Clement's motion to dismiss (ECF No. 10 ("First Motion")),<sup>1</sup> Malgesini and Malgesini IRA's motion to dismiss (ECF No. 23 ("Second Motion")),<sup>2</sup> and Plaintiffs' subsequently-filed first amended complaint (ECF No. 60 ("FAC")), which adds new

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<sup>1</sup>Plaintiffs responded (ECF No. 39), and SGT and Clement replied (ECF No. 45).

In support of the First Motion, SGT and Clement filed a request for judicial notice (ECF No. 12). Plaintiffs did not oppose the request. Because the request pertains to property records and court filings and judgments, which are matters of public record, the Court grants the request. *See Harris v. Cnty. of Orange*, 682 F.3d 1126 (9th Cir. 2012) ("We may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts."); *Kirkpatrick v. Wells Fargo Bank, N.A.*, 699 F. App'x 751 (9th Cir. 2017) ("The district court did not abuse its discretion by taking judicial notice of recorded documents related to the foreclosure of their property.").

<sup>2</sup>Plaintiffs responded (ECF No. 58), and Malgesini and Malgesini IRA replied (ECF No. 59). Plaintiffs also filed a surreply (ECF No. 62). The Court strikes the surreply because, under LR 7-2(d), "[s]urreplies are not permitted without leave of court," and under LR IC 7-1, the Court "may strike documents that do not comply with these rules."

In support of the Second Motion, Malgesini and Malgesini IRA filed a request for judicial notice (ECF No. 24). Plaintiffs did not oppose the request. However, because the Court ultimately denies the Second Motion as moot, as explained below, the Court also denies the request for judicial notice as moot.

1 Defendant Alan Horwitz. As further explained below, the Court strikes the FAC as  
2 improper as to SGT and Clement and grants the First Motion because Wood's claims  
3 against them are barred by the two-dismissal rule under Federal Rule of Civil Procedure  
4 41(a)(1)(B) and Packwood lacks standing. And because the Court finds the FAC is the  
5 operative complaint against the remaining Defendants, the Court denies the Second  
6 Motion as moot and dismisses Plaintiffs' claims against Malgesini, Malgesini IRA, and  
7 Horwitz for lack of subject matter jurisdiction.

## 8 **II. BACKGROUND**

9 On May 7, 2021, Wood filed an action in California Superior Court, Contra Costa  
10 County against SGT, Clement, Malgesini, and others who are not parties here, *Wood v.*  
11 *Malgesini et al.*, Case No. C21-00916 ("May 2021 State Action"). (ECF No. 12 at 13.)  
12 Wood alleged that Malgesini lent money to Wood for her property at 40 Hilldale Court,  
13 Orinda, California 94563 (the "Property") and that Malgesini made fraudulent statements  
14 about when Wood needed to make payments on her loans. (*Id.* at 13-14, 23.) Wood  
15 alleged this ultimately led to the Property being foreclosed on and sold at a trustee auction  
16 on November 4, 2020 to SGT and Clement, who later brought an unlawful detainer action  
17 against Wood. (*Id.* at 21-24.) Wood asserted claims for injunctive relief, fraud, wrongful  
18 foreclosure, rescission, and aiding and abetting. (*Id.* at 22-25.) On September 24, 2021,  
19 Wood voluntarily dismissed the May 2021 State Action. (*Id.* at 29.)

20 On November 12, 2021, Wood and Packwood filed an action in the U.S. District  
21 Court for the Northern District of California against SGT, Malgesini, Horwitz, and others  
22 who are not parties here. See *Wood et al. v. SGT Investments et al.*, Case No. 3:21-cv-  
23 08784-WHO, ECF No. 2 (N.D. Cal. Filed Nov. 12, 2021) ("November 2021 Federal  
24 Action"). On May 4, 2022, Packwood was removed from the action by the filing of the  
25 second amended complaint. (ECF No. 12 at 41.) In that second amended complaint,  
26 Wood alleged the same conduct that led to the same foreclosure and sale of the Property  
27 as in the May 2021 State Action (*id.* at 44-46) and additionally alleged that she was  
28 wrongfully evicted from the Property (*id.* at 47). Wood asserted claims for violation of civil

1 rights, conspiracy to violate civil rights, unlawful eviction, violation of AB 3088, and fraud  
2 (*Id.* at 47, 49-50, 52-53.) On August 23, 2022, Wood voluntarily dismissed the November  
3 2021 Federal Action. (*Id.* at 59-60.)

4 On August 19, 2022, Wood filed another federal action in the Northern District of  
5 California against SGT, Clement, Malgesini, Malgesini 401(K) Plan, and others who are  
6 not parties here. See *Wood v. Clement Holdings, LLC et al.*, Case No. 4:22-cv-04785-  
7 YGR, ECF No. 1 (N.D. Cal. Filed Aug. 19, 2022) (“August 2022 Federal Action”). Wood  
8 alleged the same conduct that led to the foreclosure and sale of the Property and her  
9 subsequent eviction. *Id.* On November 10, 2022, the court found that Wood’s claims were  
10 barred by the two-dismissal rule under Rule 41(a)(1)(B) and dismissed the claims with  
11 prejudice. (ECF No. 12 at 90-94.)

12 The instant action also involves the allegedly wrongful sale of the Property. (ECF  
13 No. 5 at 2; ECF No. 7 at 1.) Plaintiffs allege that a “back door arrangement” was made “in  
14 violation of [a]uction laws creating an illegal private sale” of the Property. (*Id.*) In the  
15 Complaint, Plaintiffs assert claims for conversion, illegal transfer, violation of due process,  
16 and violation of the Bill of Rights against SGT, Clement, Malgesini, and Malgesini IRA.  
17 (*Id.* at 1.)

18 After the First and Second Motions were filed, Plaintiffs filed the FAC, asserting  
19 claims for conversion, detrimental reliance, breach of contract, intentional interference  
20 with contract, violation of California Civil Code § 2924i, violation of California Civil Code  
21 § 2924c, and fraud against SGT, Clement, Malgesini, Malgesini IRA, and Horwitz. (ECF  
22 No. 60 at 1.)

### 23 **III. DISCUSSION**

24 As an initial matter, the Court first addresses whether Plaintiffs’ filing of the FAC  
25 was proper. The Court then addresses in turn the operative claims against SGT and  
26 Clement and those against Malgesini, Malgesini IRA, and Horwitz.

**A. Whether Filing of FAC was Proper**

Under Federal Rule of Civil Procedure 15(a)(1), “[a] party may amend its pleading once as a matter of course no later than (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or . . . motion under Rule 12(b), (e), or (f), whichever is earlier.” Here, the pleading at issue is Plaintiffs’ Complaint, to which a responsive pleading is required, so Rule 15(a)(1)(B) applies. Plaintiffs amended their Complaint by filing the FAC on May 30, 2023 without first seeking leave to amend.<sup>3</sup> (ECF No. 60.) The Court addresses in turn whether such amendment was proper as to each set of Defendants.

**1. SGT and Clement**

SGT and Clement filed their Rule 12(b) motion to dismiss on February 15, 2023, but the date of service is less clear to the Court because SGT and Clement did not attach a certificate of service to their motion or otherwise file one. (ECF No. 10.) Generally, “electronic transmission of the Notice of Electronic Filing constitutes service of a document on filers,” LR IC 4-1(b), and “[n]o certificate of service is required when a paper is served by filing it with the court’s electronic-filing system,” Fed. R. Civ. P. 5(d)(1)(B). However, at that time, *pro se* Plaintiffs were not registered as “filers” to file (and receive) documents electronically. Under LR IC 4-1(c)(6), when a document is served on non-filers, service of documents in paper form is required, even if the document is electronically filed. Therefore, in this case, SGT and Clement were required to serve their motion in paper form on Plaintiffs. And under Federal Rule of Civil Procedure 5(d)(1)(B), when a document that is required to be served is served by non-electronic means, if the document is filed, as here, “a certificate of service must be filed with it or within a reasonable time after service.”

Because no certificate of service was filed, the Court cannot—and does not presume that filing and service of the motion occurred contemporaneously. The Court

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<sup>3</sup>Although the Court’s docket indicates that Plaintiffs filed the FAC on May 31, 2023, the document itself includes a stamp from the Clerk’s Office indicating a filing date of May 30, 2023. (ECF No. 60 at 1.)

1 therefore looks to Plaintiffs' earliest indication that they had received (and thus been  
 2 served) the motion. That is, on March 1, 2023, Plaintiffs filed a motion to extend time to  
 3 respond to that motion. (ECF No. 22.) The Court therefore finds that the date of service  
 4 of SGT and Clement's motion was March 1, 2023 at the latest. Twenty-one days after  
 5 March 1, 2023 was March 22, 2023. Plaintiffs' filing of the FAC on May 30, 2023 exceeded  
 6 this 21-day period to amend as of right by over two months.

7 To amend their Complaint as to SGT and Clement, Plaintiffs needed to have  
 8 obtained the opposing parties' written consent or leave of court under Rule 15(a)(2). See  
 9 Fed. R. Civ. P. 15(a)(2). Plaintiffs did neither, and therefore, the filing of the FAC was  
 10 improper as to SGT and Clement. Accordingly, the Court strikes the FAC as to SGT and  
 11 Clement, which renders the claims in the Complaint as the operative claims against these  
 12 Defendants.

## 13 **2. Malgesini and Malgesini IRA<sup>4</sup>**

14 Malgesini and Malgesini IRA filed their Rule 12(b) motion to dismiss and a joinder  
 15 to SGT and Clement's motion to dismiss on March 8, 2023. (ECF Nos. 23, 25.) The  
 16 attached certificates of service indicated that they served the motion and joinder on that  
 17 same day. (ECF No. 23 at 16; ECF No. 25 at 2.) However, Malgesini and Malgesini IRA  
 18 later filed an amended certificate of service, stating that due to clerical error, Plaintiffs  
 19 were not properly mailed and served the motion or joinder on the filing date, and indicated  
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21 <sup>4</sup>The Court analyzes the issue of whether amendment was proper separately as to  
 22 Malgesini and Malgesini IRA because it finds that the expiration of the time to amend as  
 23 of right as to SGT and Clement does not necessarily bar such amendment as to Malgesini  
 24 and Malgesini IRA. As far as the Court can tell, the Ninth Circuit has not decided this  
 25 question of whether the expiration of the time to amend as of right as to one of several  
 26 defendants bars such amendments as to other defendants for whom 21 days have not  
 27 yet elapsed since service of their answer or applicable Rule 12 motion. See Karen L.  
 28 Stevenson, J. & James E. Fitzgerald, *Rutter Practice Guide—Federal Civil Procedure  
 Before Trial (Calif. and 9th Cir. Edition)*, Ch. 8-F (Apr. 2023) (collecting cases). However,  
 it appears that other circuits would decide that question in the negative. See *id.* (citing  
*Williams v. Board of Regents of Univ. System of Georgia*, 477 F3d 1282, 1291-92 (11th  
 Cir. 2007) (decided prior to 2009 amendment of Rule 15(a)); *Barksdale v. King*, 699 F2d  
 744, 747 (5th Cir. 1983) (same); *Anderson v. USAA Cas. Ins. Co.*, 218 F.R.D. 307, 309  
 (D.D.C. 2003) (same)). The Court follows this persuasive authority in the interests of  
 fairness to *pro se* Plaintiffs who were not properly served the Second Motion or joinder to  
 the First Motion until over two months after their filing.

1 an amended service date of May 10, 2023. (ECF No. 46 at 4.) Twenty-one days after May  
 2 10, 2023 was May 31, 2023. Plaintiffs' filing of the FAC on May 30, 2023 therefore fell just  
 3 within the 21-day period to amend as of right against Malgesini and Malgesini IRA.  
 4 Accordingly, Plaintiffs' filing of the FAC as to these Defendants was proper, and the claims  
 5 in the FAC are the operative claims against Malgesini and Malgesini IRA.

### 6 **3. Horwitz**

7 Plaintiffs' FAC adds Horwitz as a new Defendant. (ECF No. 60 at 1.) Plaintiffs  
 8 make no specific allegations against Horwitz in the FAC. In fact, Horwitz's name only  
 9 appears in the caption of the FAC and nowhere else. (*Id.*) It is therefore unclear to the  
 10 Court why Horwitz was added as a new Defendant. It may be the case that Plaintiffs'  
 11 addition of Horwitz was not proper under the applicable Federal Rules of Civil Procedure.  
 12 But the Court need not—and does not—resolve that issue here because, as further  
 13 explained below, even assuming that adding Horwitz was proper, the Court lacks subject  
 14 matter jurisdiction over Plaintiffs' claims against Horwitz.

### 15 **B. Claims Against SGT and Clement**

16 Having struck the FAC as to SGT and Clement, the Court considers the claims in  
 17 the Complaint as the operative claims against SGT and Clement. The Court thus  
 18 addresses SGT and Clement's argument in the First Motion that the two-dismissal rule  
 19 bars the claims against them, then whether it will grant Plaintiffs leave to amend.

#### 20 **1. Two-Dissmissal Rule**

21 SGT and Clement argue that Plaintiffs' Complaint must be dismissed for the same  
 22 reason Plaintiffs' August 2022 Federal Action was dismissed—as barred by the two-  
 23 dismissal rule. (ECF No. 10 at 5; ECF No. 23 at 6-10.) Plaintiffs do not dispute that the  
 24 May 2021 State Action and the November 2021 Federal Action (collectively, the “Prior  
 25 Actions”) were voluntarily dismissed. Plaintiffs instead counter that the two-dismissal rule  
 26 does not apply here because “the claims, [D]efendants[,] and ‘nucleus of facts’ are  
 27  
 28

1 sufficiently different from the prior case.” (ECF No. 39 at 2.) As further explained below,  
 2 the Court agrees with SGT and Clement.<sup>5</sup>

3 Federal Rule of Civil Procedure 41(a)(1) governs voluntary dismissal of actions by  
 4 a plaintiff and provides that a plaintiff may voluntarily dismiss an action without a court  
 5 order by filing a notice of dismissal or, where the defendant has answered or filed a motion  
 6 for summary judgment, a stipulation of dismissal signed by all the parties that have  
 7 appeared in the action. Fed. R. Civ. P. 41(a)(1)(A). It further provides that “if the plaintiff  
 8 previously dismissed any federal- or state-court action based on or including the same  
 9 claim, a notice of dismissal operates as an adjudication on the merits.” Fed. R. Civ. P.  
 10 41(a)(1)(B). “[A] voluntary dismissal is presumed to be ‘without prejudice’ unless it states  
 11 otherwise, but a voluntary dismissal of a second action operates as a dismissal on the  
 12 merits if the plaintiff has previously dismissed an action involving the same claims.”  
 13 *Commercial Space Mgmt. Co., Inc. v. Boeing Co., Inc.*, 193 F.3d 1074, 1076 (9th  
 14 Cir.1999). This rule is known as the “two dismissal rule.” *Id.*

15 As to the meaning of “same claims” under Rule 41(a)(1), “[t]he relevant inquiry is  
 16 not whether the claims identified in the various complaints match up exactly, but whether  
 17 the two suits arise from the ‘same transactional nucleus of facts’ such that the claims  
 18 pleaded are ‘all grounds for recovery which could have been asserted, whether they were  
 19 or not, in a prior suit between the same parties.’” *Melamed v. Blue Cross of California*,  
 20 Case No. CV 11-4540 PSG FFMX, 2012 WL 122828, at \*5 (C.D. Cal. Jan. 13, 2012),  
 21 *aff’d*, 557 F. App’x 659 (9th Cir. 2014) (citing *Owens v. Kaiser Foundation Health Plan*,  
 22 *Inc.*, 244 F.3d 708, 714 (9th Cir. 2001)).

23 Plaintiffs argue that the instant action arises from different facts and events than  
 24 the Prior Actions, namely that this action focuses on the alleged conversion of the  
 25 Property, while the November 2021 Federal Action “focused on the wrongful eviction that

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26  
 27 <sup>5</sup>SGT and Clement raised other arguments, but having found that the two-  
 28 dismissal rule applies, the Court need not—and does not—address these other  
 arguments. However, the Court does not appear to have personal jurisdiction over these  
 Defendants, and venue does not appear to be proper because the dispute involves  
 property located in California.



1 occurred later.” (ECF No. 39 at 2.) The Court disagrees. The May 2021 State Action arises  
2 out of the alleged wrongful foreclosure of the Property and subsequent unlawful detainer  
3 action brought against Wood. (ECF No. 12 at 13-27.) The November 2021 Federal Action  
4 arises out of the same alleged wrongful foreclosure of the Property, as well as the  
5 subsequent alleged wrongful eviction of Wood from the Property. (*Id.* at 41-57.) The  
6 instant action arises out of the same alleged wrongful foreclosure and sale of the Property.  
7 (ECF Nos. 5, 7.) Accordingly, while Plaintiffs may have asserted different claims in each  
8 action, the Court finds that the instant action and the Prior Actions all arise from the same  
9 common nucleus of facts such that the two-dismissal rule would apply here.

10 Plaintiffs also argue that the instant action differs from the Prior Actions because it  
11 involves different defendants. (ECF No. 39 at 2.) The two-dismissal rule does not require  
12 defendants to be identical or in strict privity, but merely “requires at least a relationship  
13 between the dismissed party and the party seeking to claim the benefit of the bar.” *Lake*  
14 *at Las Vegas Invs. Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 728 (9th Cir. 1991).  
15 The May 2021 State Action was brought by Wood against SGT, Clement, and others.  
16 (ECF No. 12 at 13.) The November 2021 Federal Action was brought by Wood against  
17 SGT and others. (*Id.* at 41.) SGT was therefore a defendant in both Prior Actions, while  
18 Clement was only a defendant in the May 2021 State Action.

19 While Clement was only named as a defendant in the May 2021 State Action, it  
20 was certainly implicated in the November 2021 Federal Action. The Trustee’s Deed Upon  
21 Sale indicates that Clement and SGT purchased and thereafter owned the Property  
22 together. (ECF No. 12 at 5.) Clement and SGT also both obtained default judgment in the  
23 unlawful detainer action against Wood for possession of the Property (*id.* at 11), which  
24 became the subject of the November 2021 Federal Action. The Court therefore finds, as  
25 the court also found in the August 2022 Federal Action (ECF No. 12 at 93-94), that  
26 Clement was implicitly involved in the November 2021 Federal Action and is entitled to  
27 invoke the two-dismissal rule.  
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Plaintiffs lastly argue that the instant action differs from the Prior Actions because it “includes a new Plaintiff, Taylor Packwood.” (ECF No. 39 at 4.) While that may be true, Plaintiff Wood’s claims against SGT and Clement are still barred by the two-dismissal rule, as it is undisputed that Wood voluntarily dismissed the two Prior Actions. (ECF No. 12 at 29-30, 59-60.) As to Plaintiff Packwood, because he was ultimately not involved in those voluntary dismissals,<sup>6</sup> his claims against SGT and Clement are not barred by the two-dismissal rule. However, the Court finds that Packwood has not demonstrated that he has standing to bring his claims. See *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002) (“[F]ederal courts are required sua sponte to examine jurisdictional issues such as standing.”). Packwood is nowhere mentioned in the Complaint’s allegations, and the Complaint only mentions Wood and “Wood’s property.” (ECF No. 5 at 1-2.) As far as the Court can tell, Packwood was allegedly a former tenant of Wood and never held an ownership interest in the Property. (ECF No. 12 at 44.) Accordingly, Packwood lacks standing to bring claims against SGT and Clement.

In sum, the Court dismisses Wood’s claims against SGT and Clement as barred by the two-dismissal rule and dismisses Packwood’s claims against SGT and Clement for lack of standing.

## **2. Leave to Amend Claims Against SGT and Clement**

Plaintiffs request leave to amend if the Court dismisses any of their claims. (ECF No. 39 at 4.) The Court has discretion to grant leave to amend and should freely do so “when justice so requires.” Fed. R. Civ. P. 15(a); see also *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Nonetheless, the Court may deny leave to amend if: (1) it will cause undue delay; (2) it will cause undue prejudice to the opposing party; (3) the request is made in bad faith; (4) the party has repeatedly failed to cure deficiencies; or (5) the amendment would be futile. See *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008). Here, because Wood’s claims are barred as a matter of

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<sup>6</sup>Packwood was initially included as a plaintiff in the November 2021 Federal Action but was removed from a later amended complaint before the voluntary dismissal. (ECF No. 23 at 4 n.1, 6 n.2.)

1 law by the two-dismissal rule, amendment would be futile. And because Packwood lacks  
 2 standing, the Court does not have Article III jurisdiction over his claims. Accordingly, the  
 3 Court denies Plaintiffs' request for leave to amend their claims against SGT and Clement.

#### 4 **C. Claims Against Malgesini, Malgesini IRA, and Horwitz**

5 Having earlier found that the filing of the FAC was proper as to Malgesini and  
 6 Malgesini IRA, and assuming it was also proper as to Horwitz, the Court considers the  
 7 claims in the FAC as the operative claims against these Defendants and therefore denies  
 8 the Second Motion, which addresses the Complaint, as moot. The Court now *sua sponte*  
 9 addresses whether it has subject matter jurisdiction over the operative claims.

10 "[F]ederal courts are courts of limited jurisdiction." *Owen Equip. & Erection Co. v.*  
 11 *Kroger*, 437 U.S. 365, 374 (1978). "A federal court is presumed to lack jurisdiction in a  
 12 particular case unless the contrary affirmatively appears." *Stock West, Inc. v.*  
 13 *Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989)  
 14 (citation omitted). "Because subject matter jurisdiction goes to the power of the court to  
 15 hear a case, it is a threshold issue and may be raised at any time and by any party."  
 16 *Mallard Auto. Grp., Ltd. v. United States*, 343 F. Supp. 2d 949, 952 (D. Nev. 2004) (citing  
 17 Fed. R. Civ. P. 12(b)(1)). "Additionally, the court may *sua sponte* raise the issue of lack  
 18 of subject matter jurisdiction and *must* dismiss a case if no subject matter jurisdiction  
 19 exists." *Id.* (citing Fed. R. Civ. P. 12(h)).

20 Plaintiffs invoke diversity jurisdiction as grounds for subject matter jurisdiction.  
 21 (ECF No. 60 at 5.) To establish subject matter jurisdiction under diversity of citizenship  
 22 under § 1332(a), the party asserting jurisdiction must show: (1) complete diversity of  
 23 citizenship among opposing parties; and (2) an amount in controversy exceeding  
 24 \$75,000. 28 U.S.C. § 1332(a). Here, Plaintiffs allege the parties are completely diverse  
 25 because "Plaintiff [presumably referring only to Wood] is a resident of the state of Nevada,  
 26 and all Defendants are residents of the State of California." (*Id.*) Based on the addresses  
 27 Plaintiffs submitted to the Court, at the time of the Complaint's filing and the  
 28 commencement of this action, Wood resided in Nevada, while Packwood resided in

California.<sup>7</sup> (ECF No. 5 at 1.) Packwood is therefore considered a citizen of California for purposes of the diversity jurisdiction analysis. *See Mann v. City of Tucson, Dep't of Police*, 782 F.2d 790, 794 (9th Cir. 1986) ("Existence of diversity jurisdiction is determined by the citizenship of the parties at the time of the filing of the complaint, not at the time the cause of action arose or after the action is commenced.").

Defendant Malgesini asserts in a sworn affidavit that he is a citizen of California and lives in California (ECF No. 23-1 at 1), which is corroborated by the address listed on the summons issued to Malgesini (ECF No. 6-2). *See Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000) (stating that a court may consider evidence outside the pleadings to determine subject matter jurisdiction). Moreover, Plaintiffs allege in the FAC that "all Defendants [which includes Malgesini, Malgesini IRA, and Horwitz] are residents of the State of California." (ECF No. 60 at 5.) Because one Plaintiff and at least one Defendant were both citizens of California at the time of the Complaint's filing, there is no complete diversity. Accordingly, the Court lacks subject matter jurisdiction here<sup>8</sup> and dismisses without prejudice Plaintiffs' claims against Malgesini, Malgesini IRA, and Horwitz.

#### IV. CONCLUSION

It is therefore ordered that Defendants SGT Investment and Clement Holdings's motion to dismiss (ECF No. 10) is granted. Plaintiff Wood's claims against SGT and Clement are dismissed with prejudice. Plaintiff Packwood's claims against SGT and Clement are dismissed without prejudice for lack of standing.

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<sup>7</sup>After the Complaint was filed, Packwood submitted a notice of change of address, updating his address to a Nevada address. (ECF No. 9.) Because diversity jurisdiction is determined by the citizenship of the parties at the time of the commencement of an action, the Court does not consider this updated address for purposes of establishing diversity jurisdiction. *See Mann*, 782 F.2d at 794. Moreover, a lack of complete diversity at the time of the filing of a lawsuit cannot be cured by a subsequent change in citizenship of a continuing party. *See Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 574-75 (2004).

<sup>8</sup>The Court further notes that, in addition to Plaintiffs' explicit invocation of diversity jurisdiction in the FAC (ECF No. 60 at 5), the Court also finds that all of Plaintiffs' claims in the FAC are plainly state law claims over which there could be no federal question jurisdiction (*id.* at 1).


1 It is further ordered that Defendant Malgesini and Malgesini IRA's motion to  
2 dismiss (ECF No. 23) is denied without prejudice as moot.

3 The Clerk of Court is directed to strike Plaintiffs' surreply (ECF No. 62) from the  
4 docket.

5 It is further ordered that Plaintiffs' claims against Defendants Malgesini, Malgesini  
6 IRA, and Horwitz are dismissed without prejudice for lack of subject matter jurisdiction.

7 The Clerk of Court is further directed to enter judgment accordingly and close this  
8 case.

9 DATED THIS 12<sup>th</sup> Day of June 2023.

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12 MIRANDA M. DU  
13 CHIEF UNITED STATES DISTRICT JUDGE  
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